BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL MARKS	)	
Claimant	)	
	)	
VS.	)	
	)	
CLASS LTD	)	
Respondent	)	Docket No. 1,028,497
	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the June 16, 2006 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant's injury did not arise out of and in the course of his employment and denied claimant's request for benefits.

The claimant requests review of this decision alleging the ALJ erred. Claimant maintains his accident took place while he was overseeing the care and safety of a handicapped individual while on a social outing in the community. And while the accident occurred at claimant's own home while he was in the process of preparing an area for construction, that fact alone does not render his accident a non-compensable event. Rather, claimant contends his accident arose out of and in the course of his employment with respondent as a caregiver for a handicapped individual.

Respondent denies that claimant's accidental injury arose out of or in the course of his employment and argues that the ALJ's order should be affirmed in all respects.

The issue to be resolved by this appeal is whether the claimant's injury arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is employed as a daily caregiver for a 62 year-old mentally handicapped gentleman named Johnny. This job requires him to work a split shift, arriving at 7:00 a.m. to awaken Johnny and get him prepared to go to workshop at 9:00 a.m. The claimant returns at 3:00 p.m. and stays with Johnny until 9:00 p.m., helping him to prepare for supper and bed. Included in this job is the freedom to go grocery shopping, attend social events and participate in other activities in the hopes of integrating Johnny into society.

Based upon the evidence offered at the preliminary hearing, it appears that the selection of activities is governed by claimant, although Johnny may have at times made suggestions. Of course, it was always claimant's final decision as to what was safe activity for Johnny to engage in. Claimant testified that Johnny enjoyed his friendship and as a result, claimant would often include Johnny in dinners with his family, and allowed Johnny to play with his dog, attend local basketball and football games and once even trick-or-treating at claimant's brother's house. A log was kept at Johnny's house in which claimant would write down the activities the two did on any given day. This log was not produced as an exhibit at the preliminary hearing.

On December 22, 2005 claimant was at Johnny's apartment and Johnny's mother called. She had planned to pick Johnny up that evening around 9:00 p.m. and take him home for the holidays. Claimant advised her that Johnny had gone elsewhere with friends and would not be home until after 10:00 p.m. The two agreed that she would call claimant in the morning on his cell phone and the two would arrange a meeting so that she could take Johnny. Claimant had apparently planned to take Johnny with him on some errands and he told Johnny's mother the two would be at the lumberyard or at his house on Main Street. According to claimant, Johnny's mother expressed no objection to this plan.

In late October 2005, a house owned by claimant was partially burned. Claimant was in the process of repairing the roof, and on December 23, 2005, he went to Johnny's house at 7:00 a.m. and then took him to the lumberyard. They then went to the house and waited for the lumber to be delivered. This activity was, in claimant's view, another attempt to incorporate Johnny into normal social activities. And this was something that claimant had been wanting to do for some time.

According to claimant, Johnny very much wanted to go to his house and help him repair it. In fact, claimant testified that he had taken Johnny to this house before, doing "other little chores for me and stuff like that, raking and stuff like that".[1] Claimant further

[1] P.H. Trans. at 45.

testified that Johnny had done "[y]ard work and just little stuff he could do. . ."[2] When asked if claimant made Johnny do this work he responded by saying "No, he wanted to. That's what he wanted to do, was help me."[3] He was then asked:

> Q. Okay, now in his mind was he actually helping?
> A. Oh yes.
> Q. In your mind was he actually helping?
> A. Well yeah, he was doing stuff that I didn't have to do if he did it so he was helping.[4]

While claimant was at the house, he "set him [Johnny] up with some stuff he could do, like he was picking up scraps of lumber."[5] Claimant characterizes this activity as something that filled time until Johnny's mother came to pick him up.[6] Claimant describes what happened as follows:

> A. I stepped out of a window. There was a broken window there with a piece of plastic over it and it was a window I was going to be using later in the day for entry so I took a piece of plastic off it and I took a board off and was going to throw it on the floor and give him something else to pick up because basically there wasn't a whole lot of pick up to be done and I was trying to keep him busy where he thought he was helping, you know, give him something to do and the ladder slipped out from underneath me and I broke my leg and Johnny came, you know, right to me and was concerned with me and was helping, you know, trying to help me.[7]

Claimant called a brother and his daughter and he was taken to the hospital. While at the hospital Johnny met his mother and left.

While claimant was laying outside waiting for his brother to arrive, he coincidentally received a call from his supervisor, Aaron Martinez. Mr. Martinez was checking in to make sure claimant was with Johnny. Claimant advised he was with Johnny, but that he was injured. The phone call was cut short and no further information was exchanged.

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[2] *Id.* at 18.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 26.

[6] *Id.*

[7] *Id.* at 27.

Approximately a week later all of the facts and circumstances surrounding claimant's accident came to light. Respondent terminated claimant and reported him for suspected neglect. According to claimant, he was terminated for having a client at his house without his supervisor's knowledge and for leaving him in the house while he was on the roof of his house.[8]

Aaron Martinez testified that on the morning December 22, 2005 he called Johnny's mother to inquire if she would be coming to pick him up for the holiday vacation. Mr. Martinez stated that on December 23, 2005 he was calling around to make sure that all of respondent's clients were being taken care of. When he reached claimant on his cell he learned that claimant had fallen and broken his leg. At this point Mr. Martinez did not know claimant was at his house on Main street.

Mr. Martinez testified that he was not aware that Johnny had been doing work at the claimant's house and it was not recorded in the logs. Mr. Martinez testified that coaches, such as claimant, do not need permission to take a client out in the community as it is the coach's job to help the clients assimilate into the community. He further testified that it is the client and/or the client's guardian who usually decide what activities are appropriate.

Mark Newbold, director of human resources for the respondent, testified that claimant's accident was treated as a standard injury until they became aware that Johnny, a client, was with him at the time. This caused respondent to investigate whether Johnny was being neglected and/or exploited. After obtaining numerous statements it was determined that it would be best to terminate claimant's employment.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection

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[8] *Id.* at 30.

[9] K.S.A. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

> between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the worker's accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

The ALJ concluded claimant's injury did not arise out of or in the course of his employment. Unfortunately, his Order does not provide any further analysis or rationale for this finding. Nonetheless, the Board finds this conclusion should be affirmed.

Based upon facts as presently developed, it appears that claimant's accident may well have occurred "in the course of" his employment as it occurred during his regular 7-9:00 a.m. shift while in Johnny's presence. However, both elements of the statute must be met in order for claimant's claim to be compensable. Here, the Board finds claimant's bare assertion that he took Johnny "out in the community" does not transform this injury into a compensable event.

An injury arises "out of" one's employment when the injury bears a causal connection to the employment. And while a slight deviation from normal work duties is acceptable, there are limits to this concept. In Larson's *Workers' Compensation Law*, the majority rule is that an identifiable deviation from a business trip for personal reasons takes the employee out of the course of employment until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. § 17.01 (1999). A deviation from the employer's work generally consists of a personal or nonbusiness-related activity.[12]

Under these facts, claimant decided to take Johnny with him to run a personal errand. That errand continued when they went to claimant's house on Main and waited for the lumber to be delivered. While it is admirable that claimant incorporated Johnny into his life and daily activities, this inclusion cannot transform every activity into one covered by the protections of the Kansas Workers Compensation Act. Claimant maintains he was merely keeping Johnny busy while waiting for his mother to pick him up. Yet claimant's own testimony is that Johnny was helping him clean up the site, doing work that claimant would have otherwise had to do. More to the point, claimant did not take Johnny out into the community, claimant took Johnny to his own house. And this was not a slight deviation as the two stayed there waiting for the lumber to be delivered, spending enough time that claimant began working on his construction project and ultimately falling, and breaking his leg.

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[11] *Id.*

[12] *Id.* at 284.

The Board agrees with the respondent's contention that this was a personal business errand, a deviation from his normal work duties and therefore, claimant's injury did not arise out of *and* in the course of his employment with respondent.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.[13]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated June 16, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2006.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brian Collignon, Attorney for Respondent and its Insurance Carrier

[13] K.S.A. 44-534a(a)(2).